IN THE

# Supreme Court of the United States

October Term, 1976
No. 76-199

WENDELL OLK,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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WENDELL OLK,

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UNITED STATES OF AMERICA.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioner hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

**Opinion.**

The opinion of the United States District Court for the District of Nevada is reported at 388 Fed.Supp. 1108 (Appendix A *infra* pp. 1-13). The opinion of the Court of Appeals is reported at .... F.2d .... (Appendix B *infra* pp. 14-21).

**Jurisdiction.**

The judgment of the Court of Appeals was entered June 1, 1976 and Petition for Rehearing was denied

July 14, 1976. On July 26, 1976 the Court ordered a stay of its mandate pending the filing of Petition for Writ of Certiorari to be filed in the office of the Clerk of the Supreme Court of the United States on or before August 13, 1976. The jurisdiction of this Court is given by 28 U.S.C., Sec. 1254, *et seq.*

**Question for Decision.**

The question for decision is whether money given to Petitioner by patrons of the gambling casinos where he worked in Las Vegas, Nevada (colloquially called "tokes") were given as compensation for services rendered and therefore taxable income, or whether they were gifts within the meaning of Section 102 of the Internal Revenue Code and therefore excludible from taxable income. The District Court held they were not compensation for services rendered but were gifts.

**Statutes Involved.**

Section 61(a) of the Internal Revenue Code of 1954 defines gross income as follows:

(a) General definition—*except as otherwise provided in this sub-title,* gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions and similar items. (italics supplied).

(2) Section 102 of the Internal Revenue Code excludes from gross income the value of property received by gift, bequest, devise or inheritance.



**Statement of the Case.**

In 1971 plaintiff was employed as a craps dealer in two Las Vegas gambling casinos, the Horseshoe Club and the Sahara Hotel. The basic services performed by plaintiff and other dealers were described at trial. There are four persons involved in the operation of the game, a boxman and three dealers. One of the three dealers, the stickman, calls the roll of the dice and then collects for the next shooter. The other two dealers collect losing bets and pay off winning bets under the supervision of the boxman. The boxman is the casino employee charged with direct supervision of the dealers and the play at one particular table. He in turn is supervised by the pit boss who is responsible for several tables. The dealers also make change, advise the boxman when a player would like a drink and answer basic questions about the game for the players.

Dealers are forbidden to fraternize or engage in unnecessary conversation with the casino patrons, and must remain in separate areas while on their breaks. Dealers must treat all patrons equally, and any attempt to provide special service to a patron is grounds for termination.

At times, players will give money to the dealers or place bets for them. The witnesses testified that most casinos do not allow boxmen to receive money from patrons because of their supervisory positions, although some do permit this. The pit bosses are not permitted to receive anything from patrons because

they are in a position in which they can insure that a patron received some special service or treatment.

The money or tokes are combined by the four dealers and split equally at the end of each shift so that a dealer will get his share of the tokes received even while he is taking his break. Uncontradicted testimony indicated that a dealer would be terminated if he kept a toke rather than placed it in the common fund.

Casino management either required the dealers to pool and divide tokes or encouraged them to do so. Although the practice is tolerated by management, it is not encouraged since tokes represent money that players are not wagering and thus cannot be won by the casino. Plaintiff received about $10 per day as his share of tokes at the Horseshoe Club and an average of $20 per day in tokes at the Sahara.

Plaintiff's 1971 tax return was audited by the Internal Revenue Service and he was assessed a total of $792.42 in additional taxes, interest and penalties based on the tokes from the casinos which had not been reported as income. Plaintiff paid this amount, filed a timely claim for refund, and then commenced this suit.

There is no obligation for a patron to give anything to a dealer and there is no social compunction for him to do so. Between 90-95% of the patrons who gamble give nothing to a dealer. Patrons give money not only to dealers, but to other players or mere spectators at the game.



## REASON FOR GRANTING THE WRIT.

(1) The issue in this case involves the application of a Federal Revenue Law which has not been, but should be, settled by this Court. It is of great importance to the State of Nevada and its economy.

(2) The Ninth Circuit has departed from the accepted and usual course of judicial proceedings by failing and refusing to follow its own decisions with respect to the burden on an Appellant appealing from a judgment of the trier of the facts and its own duty on appellate review.

In *Smith v. James Irvine Foundation,* 402 F.2d 772, cert. den. 22 L.Ed.2d 777, the Ninth Circuit said that in reviewing the record the Court of Appeals is not to retry the issue of fact nor to supplement the District Court's judgment with that of its own. That it is presumed on appeal that the district Court's findings are correct. That since it is presumed that the district Court's findings are correct, our role is limited to determining whether the Appellant has rebutted the presumption of correctives by demonstrating that contrary findings are warranted when the evidence is taken as a whole and considered in a light most favorable to Appellant.

In *Tonkoff v. Barr,* 245 F.2d 742 (1957), this Court of Appeals held that where the evidence was conflicting but the memorandum decision indicated that the trial Judge considered the motive and other indicia of credibility as applied to the various witnesses and was impressed with evidence that sustained Appellee's position under the circumstances, the court of Appeals could not substitute its judgment for that of the trial Court. Fed.R.Civ.Proc. 52(a).

*See also Woody v. U.S.,* 368 F.2d 668 (Ca. 9-1966).

(3) The District Court made 18 findings of fact, the first 17 of which the Court of Appeals accepted and found not to be clearly erroneous.

However, the Court said that Finding No. 18 "that tokes are the result of detached and disinterested generosity on the part of a small number of patrons" is a conclusion of law and therefore not subject to the clearly erroneous rule. The Circuit rejects the trial Court's characterization that tokes are the result of detached and disinterested generosity, yet it accepts as the dominant motive "impulsive generosity or superstition" on the part of the players.

Is there any difference? The trial Court did not think so. In its last paragraph of its memorandum opinion it said,

> ". . . these spontaneous or superstitious impulses fall within the realm of possibilities contemplated by the Supreme Court in Duberstein and thus met the test for a gift under the Internal Revenue Code. A product of detached and disinterested generosity."

In Finding No. 17, the trial Court draws its inference from the basic facts as to the dominant reason for giving tokes, and decides the only question involved, when it finds the tokes are not given as compensation for services. The Circuit court accepts this finding as not clearly erroneous.

The Government does not agree with the Circuit Court's determination that Finding No. 18 is a conclusion of law. In its brief filed with that Court it says that the question whether the transfer is a product of "detached and disinterested generosity" is a factual determination and subject to the clearly erroneous rule.



Moreover, if Finding No. 18 is surplusage or inconsistent with the trial Court's discussion, the discussion is to be controlling. (See Conclusion of Law No. 4.)

(4) Instead of relying on its own opinions as to its duty on appellate review, it relies on the decision of the Fourth Circuit in *Poyner v. Commissioner,* 301 F.2d 287 (not cited by the Government).

This case was submitted to the Tax Court on a stipulation of facts before this Court's decision in *Duberstein*. The Tax Court found payments to a widow compensation because a corporate resolution so described it. Such decision was in conflict with prior Tax Court decisions on similar facts. The Circuit Court did not reverse the Tax Court but remanded it for further proceedings.

In this case the Fourth Circuit said:

> ". . . an enumeration of the criteria by which the trier of the fact shall determine in every type of case what the dominant reason is, was deemed inadvisable, if not futile. The Court preferred to leave the development of such criteria to a case-by-case approach to the lower Courts."

(5) The Ninth Circuit has decided a federal question in a way in conflict with the applicable decisions of this Court in the cases of:

*Duberstein v. U.S.*, 363 U.S. 728;

*Stanton v. U.S.*, 363 U.S. 728;

*United States v. Kaiser*, 363 U.S. 299.

These cases stress the fact that whether a payment or transfer of money is a tax exempt gift or taxable income is to be determined after a consideration of

all the facts, on a case by case basis with primary weight to be given to the conclusions of the trial Court; that appellate review is quite restricted and that where the trial is before a Judge without a jury, the Judge's findings must stand unless clearly erroneous. The determination of the dominant motive is a question of fact and not a conclusion of law.

(6) The evidentiary facts are undisputed and the trial Court is free to decide whether as a matter of law the "tokes" are taxable or non-taxable.

**Conclusion.**

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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## APPENDIX A.

### Memorandum, Findings of Fact, Conclusions of Law and Order.

United States District Court, District of Nevada.

Wendell Olk v. United States of America, Civil LV 2076, RDF.

Filed Feb. 13, 1975.

This action for a tax refund was tried to the Court on January 20, 1975. The case presented by plaintiff was brief and the Government offered no testimony, contenting itself with the introduction of two exhibits. Although only one issue is presented for resolution, the outcome is of some interest in Nevada. The Court must determine whether monies or "tokes" which were received by plaintiff from patrons of the casinos where he worked were taxable income or gifts.

Gross income, from which taxable income is computed, is succinctly defined:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) compensation for services, including fees, commissions, and similar items; . . . *Int. Rev. Code* of 1954, § 61.

Tips are specifically included in gross income according to the applicable regulation:

> (a) *In general.* (1) wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions

> on insurance premiums, tips, . . . are income to the recipients unless excluded by law. . . . 26 C.F.R. § 1.61-2(a).

Plaintiff contends that the monies are not income as defined above, but gifts from the patrons specifically excluded from gross income. "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance. . . ." *Int. Rev. Code* of 1954, § 102(a).

This divergence of opinion is the heart of the controversy and presents a nice question. To characterize the monies received as "tips," which the Government does, assumes the answer. Such monies will, therefore, be referred to as "tokes," a colloquial term, until their legal and taxable status is determined.

## FACTS

The underlying facts do not present an area of of significant dispute. In 1971 plaintiff was employed as a craps dealer in two Las Vegas gambling casinos, the Horseshoe Club and the Sahara Hotel. The basic services performed by plaintiff and other dealers were described at trial. There are four persons[1] involved in the operation of the game, a boxman and three dealers. One of the three dealers, the stickman, calls the roll of the dice and then collects them for the next shooter. The other two dealers collect losing bets and pay off winning bets under the supervision of

[1]There are actually five individuals, the boxman and four dealers. The dealers work 60 minutes and then get a 20 minute break, repeating the process throughout the eight hour shift. The result is a crew of three dealers on and one off at any given time. Every time a different dealer takes his break, the remaining three change position so that each will serve as dealer and stickman throughout the shift.



the boxman. The boxman is the casino employee charged with direct supervision of the dealers and the play at one particular table. He in turn is supervised by the pit boss who is responsible for several tables. The dealers also make change, advise the boxman when a player would like a drink and answer basic questions about the game for the players.

Dealers are forbidden to fraternize or engage in unnecessary conversation with the casino patrons, and must remain in separate areas while on their breaks. Dealers must treat all patrons equally, and any attempt to provide special service to a patron is grounds for termination.

At times, players will give money to the dealers or place bets for them. The witnesses testified that most casinos do not allow boxmen to receive money from patrons because of their supervisory positions, although some do permit this. The pit bosses are not permitted to receive anything from patrons because they are in a position in which they can insure that a patron receives some special service or treatment.

The money or tokes are combined by the four dealers and split equally at the end of each shift so that a dealer will get his share of the tokes received even while he is taking his break. Uncontradicted testimony indicated that a dealer would be terminated if he kept a toke rather than placed it in the common fund.

Casino management either required the dealers to pool and divide tokes or encouraged them to do so. Although the practice is tolerated by management, it is not encouraged since tokes represent money that players are not wagering and thus cannot be won

by the casino. Plaintiff received about $10 per day as his share of tokes at the Horseshoe Club and an average of $20 per day in tokes at the Sahara.[2]

Plaintiff's 1971 tax return was audited by the Internal Revenue Service and he was assessed a total of $792.42 in additional taxes, interest and penalties based on the tokes from the casinos which had not been reported as income. Plaintiff paid this amount, filed a timely Claim for Refund, and then commenced this suit.

## DISCUSSION

A payment of money cannot be both compensation for services and a nontaxable gift. The terms are mutually exclusive. *Bogardus v. Commissioner,* 302 U.S. 34 (1937). In the leading case of *Commissioner v. Duberstein,* 363 U.S. 278 (1960), the Supreme Court defined the term "gift" for purposes of the Internal Revenue Code.

> A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," . . . "out of affection, respect, admiration, charity or like impulses." And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." 363 U.S. 278, 285-86 (1960) (citations omitted).

Of equal importance for purposes of this case is what the Supreme Court excluded from the definition

[2]The major reason for this difference is the fact that the Horseshoe Club is located in downtown Las Vegas while the Sahara is on "The Strip." Patrons of Strip casinos are generally wealthier, or willing to wager more, than their counterparts in the downtown casinos and thus will give a larger toke to dealers.



of a gift, "And, conversely, '[W]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it.' " In the accompanying footnote, the Court referred to cases including "tips" in gross income as "classic examples" of situations where the payment was not a gift for tax purposes, citing *Roberts v. Commissioner,* 176 F.2d 221 (9th Cir. 1949). *Commissioner v. Duberstein,* 363 U.S. 278, 285, fn. 7 (1960).

The characterization given to the transaction by the donor is not determinative; there must be an objective inquiry made to determine whether a gift in name is also one in fact. *Commissioner v. Duberstein, supra*; *Bogardus v. Commissioner, supra.* Accordingly, whether the payment is a gift or taxable income is a question of fact to be determined by a consideration of the specific circumstances of the case, *Commissioner v. Duberstein, supra; Woody v. United States,* 368 F.2d 668 (9th Cir. 1966), emphasizing the experiences of the fact-finder with human nature.

> Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Commissioner v. Duberstein,* 363 U.S. 278, 289 (1960).

For present purposes, a tip may be defined as a payment of money to an individual who has rendered a service, either as additional compensation because of the quality or promptness of the service or, as a result of social compulsion, because the recipient feels obligated to give the individual a sum of money beyond what is charged for the service itself. In either event, the giving of a tip is closely related to the performance of a personal service and has become "expected" to the extent that it is no longer, if it even was, the product of "detached and disinterested generosity." Because of the tie to services rendered and social compulsion, the status of tips as taxable income is well established. *Andrews v. United States,* 295 F.2d 819 (Ct. Cl. 1961), *cert. denied,* 369 U.S. 829 (1962), (taxicab driver); *Roberts v. Commissioner,* 176 F.2d 221 (9th Cir. 1949) (taxicab driver); *Meneguzzo v. Commissioner,* 43 T.C. 824 (1965) (waiter).

Plaintiff does not dispute the fact that tips are taxable, but instead strongly argues that tokes are not tips. He is challenged in this contention by the Government which has cited *Bevers v. Commissioner,* 26 T.C. 1218 (1956) as dispositive of the issue. The facts of *Bevers* are identical with those in the present case. The petitioner, Bevers, was employed in Las Vegas casinos as a dealer in blackjack, roulette and dice (craps). His duties as a craps dealer were the same as those performed by plaintiff here, and the same rules prohibiting fraternization with patrons applied. Dealers on each shift pooled the money they received from patrons, and management acquiesced in the practice.

Relying on its decision in *Roberts,* affirmed by the Ninth Circuit, the Tax Court held that the "side money"



received by petitioner constituted taxable income. This Court, having scrutinized the evidence and the *Bevers* opinion with great care, has come to the conclusion that the Tax Court misapplied the principles enunciated in *Roberts.*

The Court is of the opinion that the Tax Court failed to take into account the uniqueness of a dealer's activities when compared to those engaged in by a cab driver or one in a similar service capacity. In *Roberts,* tips were directly related to personal services performed by the cab driver. The driver's compensation by his employer was fixed according to a formula, and he was forbidden to solicit tips. He was not, however, forbidden to accept tips. The driver was thus presented with two possibilities. He could go out of his way to be friendly and helpful to his passengers, thereby encouraging them to recognize the superior quality of the service rendered and to tip him to show their satisfaction. In the alternative, he could provide adequate or inferior service and rely upon social compulsion to force the passenger to tip him or endure his scowl or verbal disapproval. Because the custom of tipping individuals such as cab drivers was so well known, the reluctant tipper was almost certain to be aware of it and its attendant compulsive aspects. The same considerations would also apply in the case of waiters/waitresses and others similarly situated.

The dealer finds himself in a different position. Only a limited number of people are employed as dealers, and these only in Nevada. This in itself is one of the unique aspects of this case, since decisions regarding tips in other callings are made in light of conditions prevailing generally across the country and on the basis of national experience. If he attempts to render

special service to a patron, a dealer is subject to immediate termination. He is forbidden to engage in the personable conduct which others rely on to obtain or increase the amount of a tip. He does not furnish a *personal service,* but merely carries out the duties of his employment. This is a critical distinction since while a cab driver or waitress furnishes a basic service to the employer, to the general benefit of the customer, as well as a personalized service to the customer both in impact and *manner* of performance, the dealer furnishes only the basic service to the employer and must adopt an impersonal attitude toward the patron. Thus, there can be no "service-tip" for a dealer since he is forbidden to perform the type of special service which historically forms the basis for an additional payment of money.

Neither can a dealer benefit from the "social compulsion-tip" as can others. Testimony at trial indicated that only 5 to 10% of those who play will give money to a dealer, or stated in reverse, that 90 to 95% of those who play will *not* give anything to a dealer. Such evidence indicates that patrons are either unaware of such a practice or decline to indulge in it. In either event, there can be no compulsion to tip irrespective of service since the dealer is forbidden to display any disapproval and is unable to retaliate by lowering the quality of service, and the other patrons are either consciously or unconsciously oblivious so that no peer pressure is exerted.

Further, patrons' satisfaction with a dealer's service is not dictated by the quality of service itself, which does not vary, but by that phenomenon known as "luck." A player's luck is beyond any possible control by the dealer, assuming the game is an honest one.



This is not so in other situations where satisfaction is dictated by service within the complete control of the individual performing it.

The Court believes that money given to dealers does not come as an "incident of the services performed" as the Tax Court found in *Bevers.* The dealer functions in an almost machine-like manner and performs no service which the Court feels is compensable by patrons by means of the traditional tip. The fact that tokes are pooled and divided is not significant. It may well be a means of self-protection adopted by dealers lest the ill fortune of patrons fall upon one more than upon others. It also strengthens the assertion that since all perform equally, all share equally in their collective good, or bad, fortune. Management's acquiescence could well indicate that it is preferable to have all share equally rather than have dealers attempt to give special attention to particular patrons in order to increase their individual amount of tokes. Even attempts to provide special service which are successful would gain a dealer little since he would have to share the proceeds with the others or risk termination.

After a careful consideration, the Court finds that the evidence presented by the plaintiff is sufficient to sustain a determination that tokes are gifts within the meaning of § 102(a).[3] The only evidence in the record indicates that dealers were paid a salary which they felt was fair and adequate for the functions they were to perform, and they were not told they would receive additional compensation in the form of tokes.

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[3]As a result of this finding, the Court need not consider what other possible categorization of these monies would be appropriate under the Internal Revenue Code. However, such an inquiry would have been pursued of necessity if the monies were found to be neither tips nor gifts.

This is not a situation where the evidence justifies the inference that management used tokes as camouflaged compensation and thus paid dealers lower wages than they otherwise would have had to pay. The Government had ample opportunity to introduce evidence to show that tokes were used by the casinos as "incidents of service" and thus within the ambit of the "tip" cases previously decided. Its failure to introduce such evidence cannot now be used to the plaintiff's detriment.

The determinative factor in gift cases is, ". . . the intention with which payment, however, voluntary, has been made." *Commissioner v. Duberstein,* 363 U.S. at 286, quoting *Bogardus v. Commissioner,* 302 U.S. at 45 (dissenting opinion). Testimony by witnesses indicated that players were moved by sudden impulses of generosity to share their good fortune with others. Money was given not only to dealers, but to other players and even mere spectators in the vicinity of the game. Some players may well give money to others in the superstitious belief that the recipient is "lucky" for them and that by sharing part of the winnings their good fortune will continue. The fact that the lucky player and the recipient may be unknown to each other is not detrimental to plaintiff's case, but serves to emphasize the spontaneous nature of these transactions. However irrational this mode of behavior may appear to some, it is not an unusual occurrence in gambling casinos of Nevada.

The fact that such happenings take place only in fairly small and geographically well-defined areas should not be used to deny them the status which these



unique settings and situations provide. These spontaneous or superstitious impulses fall within the realm of possibilities contemplated by the Supreme Court in *Duberstein* and thus meet the test for a gift under the Internal Revenue Code: A product of detached and disinterested generosity. The Court therefore makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. This is a suit for refund of Federal income taxes, interest and penalties in the amount of $792.42 for calendar year 1971.

2. The amount of $794.42 represents the taxes, interest and penalties assessed against plaintiff by the Internal Revenue Service based upon receipt of monies from patrons in the casinos where plaintiff worked which had not been declared as income.

3. Plaintiff paid this amount in full.

4. During 1971, plaintiff was employed as a craps dealer at both the Horseshoe Club and the Sahara Hotel in Las Vegas, Nevada.

5. As a dealer, performed services for his employers for which he was paid a daily wage.

6. Plaintiff worked an eight hour shift. His duties, when a stickman, were to call the roll of the dice and collect them for the next shooter. His duties, when a dealer, were to pay all winning bets and to collect all losing bets for the casino. At all time he was under the supervision of a boxman who was in turn supervised by the pit boss.

7. Plaintiff and other dealers were not permitted to fraternize with casino patrons, and were required to remain separated from patrons when taking breaks or eating. All contact was kept to an absolute minimum.

8. As a dealer, plaintiff treated all patrons equally and rendered no special personalized service of any kind to any patron.

9. An attempt to render special service would result in plaintiff's immediate termination.

10. Patrons would sometimes give money to dealers, other players or mere spectators at the game. Patrons would sometimes place bets for the dealer.

11. There is no obligation for a patron to give anything to a dealer, and there is no special compulsion for him to do so.

12. Between 90-95% of the patrons who gamble give nothing to a dealer.

13. Dealers perform no service for patrons which a patron would normally find compensable.

14. All monies given to dealers (tokes) must be placed in a common fund to be divided equally among all dealers at the table.

15. Management acquiesces in this practice although it does not favor it because it keeps money out of play.

16. There is no direct relation between services performed for management by a dealer and benefit or detriment to the patrons.

17. The tokes are given to dealers as a result of impulsive generosity or superstition on the part of players, and not as a form of compensation for services.

18. Tokes are the result of detached and disinterested generosity on the part of a small number of patrons.



## CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this suit. 28 U.S.C. § 1346(a)(1); 26 U.S.C. § 7422(a).

2. Tokes received by plaintiff from patrons of the gambling casinos were not compensation for services performed by plaintiff, but gifts within the meaning of section 102 of the Internal Revenue Code of 1954.

3. Plaintiff is entitled to judgment against the defendant in the sum of $792.42 with interest and costs.

4. In the event of any discrepancy between the Discussion portion of the Memorandum and the Findings of Fact, the Discussion is to be controlling.

BY THE COURT:

/s/ Thomas J. Clary
Thomas J. Clary, Senior Judge
United States District Court
(Sitting by Special Designation)

## APPENDIX B.

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Wendell Olk, *Plaintiff-Appellee*. vs. United States of America, *Defendant-Appellant*. No. 75-2181.

[June 1, 1976].

Appeal from the United States District Court for the District of Nevada.

Before: GOODWIN and SNEED, Circuit Judges, and VAN PELT,* District Judge.

SNEED, Circuit Judge:

This is a suit to obtain a refund of federal income taxes. The issue is whether monies, called "tokes" in the relevant trade, received by the taxpayer, a craps dealer employed by Las Vegas casinos, constitute taxable income or gifts within the meaning of section 102(a), Int. Rev. Code of 1954. The taxpayer insists "tokes" are non-taxable gifts. If he is right, he is entitled to the refund for which this suit was brought. The trial court in a trial without a jury held that "tokes" were gifts. The Government appealed and we reverse and hold that "tokes' are taxable income.

I. *The Facts.*

There is no dispute about the basic facts which explain the setting in which "tokes" are paid and received. The district court's finding with respect to such facts which we accept are, in part, as follows:

> In 1971 plaintiff was employed as a craps dealer in two Las Vegas gambling casinos, the Horseshoe

*Honorable Robert Van Pelt, United States District Judge for the District fo Nebraska, sitting by designation.



Club and the Sahara Hotel. The basic services performed by plaintiff and other dealers were described at trial. There are four persons involved in the operation of the game, a boxman and three dealers. One of the three dealers, the stickman, calls the roll of the dice and then collects them for the next shooter. The other two dealers collect losing bets and pay off winning bets under the supervision of the boxman. The boxman is the casino employee charged with direct supervision of the dealers and the play at one particular table. He in turn is supervised by the pit boss who is responsible for several tables. The dealers also make change, advise the boxman when a player would like a drink and answer basic questions about the game for the players.

Dealers are forbidden to fraternize or engage in unnecessary conversation with the casino patrons, and must remain in separate areas while on their breaks. Dealers must treat all patrons equally, and any attempt to provide special service to a patron is grounds for termination.

At times, players will give money to the dealers or place bets for them. The witnesses testified that most casinos do not allow boxmen to receive money from patrons because of their supervisory positions, although some do permit this. The pit bosses are not permitted to receive anything from patrons because they are in a position in which they can insure that a patron receives some special service or treatment.

The money or tokes are combined by the four dealers and split equally at the end of each shift so that a dealer will get his share of the tokes

received even while he is taking his break. Uncontradicted testimony indicated that a dealer would be terminated if he kept a toke rather than placed it in the common fund.

Casino management either required the dealers to pool and divide tokes or encouraged them to do so. Although the practice is tolerated by management, it is not encouraged since tokes represent money that players are not wagering and thus cannot be won by the casino. Plaintiff received about $10 per day as his share of tokes at the Horseshoe Club and an average of $20 per day in tokes at the Sahara. (footnotes omitted).

Additional findings of fact by the district court are that the taxpayer worked as a stickman and dealer and at all times was under the supervision of the boxman who in turn was supervised by the pit boss. Also the district court found that patrons sometimes give money to dealers, other players or mere spectators at the game, but that between 90-95% of the patrons give nothing to a dealer. No obligation on the part of the patron exists to give to a dealer and "dealers perform no service for patrons which a patron would normally find compensable." Another finding is that there exists "no direct relation between services performed for management by a dealer and benefit or detriment to the patron."

There then follows two final "findings of fact" which taken together constitute the heart of the controversy before us. These are as follows:

> 17. The tokes are given to dealers as a result of impulsive generosity or superstition on the part of players, and not as a form of compensation for services.



> 18. Tokes are the result of detached and disinterested generosity on the part of a small number of patrons.

These two findings, together with the others set out above, bear the unmistakable imprint of *Commissioner v. Duberstein*, 363 U.S. 278 (1959), particularly that portion of the opinion which reads as follows:

> The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner*, 302 U.S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States*, 343 U.S. 711, 714. A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner v. LoBue*, 351 U.S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson v. United States, supra*, at 714. And in this regard, the most critical consid-

> eration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus v. Commissioner,* 302 U.S. 34, 43. "What controls is the intention with which payment, however voluntary, has been made." *Id.,* at 45 (dissenting opinion).

*Id.* at 285-86 (footnotes omitted).

II. *Finding Number 18 Is A Conclusion of Law.*

The position of the taxpayer is simple. The above findings conform to the meaning of gifts as used in section 102 of the Code. *Duberstein* further teaches, the taxpayer asserts, that whether a receipt qualified as a non-taxable gift is "basically one of fact," *id.* at 290, and appellate review of such findings is restricted to determining whether they are clearly erroneous. Because none of the recited findings are clearly erroneous, concludes the taxpayer, the judgment of the trial court must be affirmed.

We could not escape this logic were we prepared to accept as a "finding of fact" the trial court's finding number 18. We reject the trial court's characterization. The conclusion that tokes "are the result of detached and disinterested generosity" on the part of those patrons who engage in the practice of toking is a conclusion of law, not a finding of fact. Finding number 17, on the other hand, which establishes that tokes are given as the result of impulsive generosity or superstition on the part of the players is a finding of fact to which we are bound unless it is "clearly erroneous" which it is not.

The distinction is between a finding of the dominant reason that explains the player's action in making the transfer and the determination that such dominant rea-



son requires treatment of the receipt as a gift. Finding number 17 is addressed to the former while number 18 the latter. A finding regarding the basic facts, *i.e.,* the circumstances and setting within which tokes are paid, and the dominant reason for such payments are findings of fact, our review of which is restricted by the clearly erroneous standard. Whether the dominant reason justifies exclusion from gross income under section 102 as interpreted by *Duberstein* is a matter of law. Finding number 18 is a determination that the dominant reason for the player's action, as found in number 17, justifies exclusion. This constitutes an application of the statute to the facts. Whether the application is proper is, of course, a question of law.

Our view is supported by Judge Sobeloff's opinion in *Poyner v. Commissioner,* 301 F.2d 287 (4th Cir. 1962). He drew a line between the basic facts, the actual happenings, and a finding of the "dominant reason" for the payments on the one hand and the determination whether the "dominant reason" justified exclusion from gross income on the other. The latter requires an application of the law to the facts and with respect to it the appellate court may make an independent judgment. *Id.* at 290.

This is a sensible approach. Otherwise an appellate court's inescapable duty of appellate review in this type of case would be all but foreclosed by a finding, such as in number 18, in which the resolution of the ultimate legal issue was disguised as a finding of fact. The error in insisting that findings numbers 17 and 18 are both findings of fact with respect to the "dominant reason" is revealed when the language of finding number 18 is compared with *Duberstein's* statement, "A gift in the statutory sense, on the other

hand, proceeds from a 'detached and disinterested generosity,' *Commissioner v. LoBue,* 351 U.S. 243, 246; 'out of affection, respect, admiration, charity or like impulses'." 363 U.S. at 285. Their similarity is not coincidental and demonstrates that finding number 18 is but an application of the statutory definition of a gift to all previous findings of fact including finding number 17. Number 18 merely characterizes all previous findings in a manner that makes classification of the receipt as a gift inevitable. "Detached and disinterested generosity" are, by reason of *Duberstein,* the operative words of the statutory definition of a gift. To apply them to facts, including a finding with respect to "dominant motive" is to apply the statute to such facts. It is a conclusion of law.

III. *Finding Number 18 and Other Conclusions of Law Based Thereon Are Erroneous.*

Freed of the restraint of the "clearly erroneous" standard, we are convinced that finding number 18 and all derivative conclusions of law are wrong. "Impulsive generosity or superstition on the part of the players" we accept as the dominant motive. In the context of gambling in casinos open to the public such a motive is quite understandable. However, our understanding also requires us to acknowledge that payments so motivated are not acts of "detached or disinterested generosity." Quite the opposite is true. Tribute to the gods of fortune which it is hoped will be returned bounteously soon can only be described as an "involved and intensely interested" act.

Moreover, in applying the statute to the findings of fact, we are not permitted to ignore those findings which strongly suggest that tokes in the hands of the



ultimate recipients are viewed as a receipt indistinguishable, except for erroneously anticipated tax differences, from wages. The regularity of the flow, the equal division of the receipts, and the daily amount received indicate that a dealer acting reasonably would come to regard such receipts as a form of compensation for his services. The manner in which a dealer may regard tokes is, of course, not the touchstone for determining whether the receipt is excludable from gross income. It is, however, a reasonable and relevant inference well-grounded in the findings of fact.

Our view of the law is consistent with the trend of authorities in the area of commercial gratuities as well as with the one decision squarely in point, *Lawrence E. Bevers,* 26 T.C. 1218 (1956), and this Circuit's view of tips as revealed in *Roberts v. Commissioner,* 176 F.2d 221 (9th Cir. 1949). Generalizations are treacherous but not without utility. One such is that receipts by taxpayers engaged in rendering services contributed by those with whom the taxpayers have some personal or functional contact in the course of the performance of the services are taxable income when in conformity with the practices of the area and easily valued. Tokes, like tips, meet these conditions. That is enough.

The taxpayer is not entitled to the refund he seeks.

REVERSED.

No. 76-199

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

WENDELL OLK, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the district court (Pet. App. A) is reported at 388 F. Supp. 1108. The opinion of the court of appeals (Pet. App. B) is reported at 536 F. 2d 876.

## JURISDICTION

The judgment of the court of appeals was entered June 1, 1976, and a petition for rehearing was denied on July 14, 1976. The petition for a writ of certiorari was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether payments petitioner regularly received from patrons at gambling casinos where he worked as a dealer must be included in his taxable income.

## STATUTES AND REGULATIONS INVOLVED

Sections 61(a)(1) and 102(a) of the Internal Revenue Code of 1954 (26 U.S.C.), and Treasury Regulations, Sections 1.61-1(a) and 1.61-2(a)(1) (26 C.F.R.), are set forth in the Appendix, *infra*, pp. 8-10.

## STATEMENT

During 1971, the taxable year in issue, petitioner worked as a dealer at craps tables at two gambling casinos in Las Vegas, Nevada. The operation of a craps table generally requires the services of four persons, a "boxman" and three dealers. One dealer (the "stickman") calls the roll of the dice and collects the dice for the next player. The other two dealers collect losing wagers and pay winning wagers. The dealers are supervised by the boxman who, in turn, is supervised by the "pit boss." Although dealers are forbidden to engage in "unnecessary" conversation with patrons, they are expected to answer a player's general questions about the game and are required to repeat all bets, to make change for players, and to relay a player's beverage request to the boxman (Pet. App. A 2-3).

As a dealer, petitioner regularly received payments from players. These payments, known colloquially as "tokes," were made in the form of either direct cash payments to petitioner or bets placed by the players on behalf of petitioner. Petitioner and the other dealers "pooled" their tokes and divided them up into equal shares at the end of each shift (Pet. App. A 3).[1] During 1971, petitioner received $3,750 in tokes in addition to

[1]Although the casinos permitted the dealers to accept "tokes" from players, they prohibited the "boxman" and "pit boss" from accepting tokes because of their supervisory positions (Pet. App. A 3).



his reported salary of $6,465 as a casino employee (I-R. 129; Ex. A).[2]

Petitioner did not include the "tokes" in his taxable income. On audit, the Commissioner of Internal Revenue determined that the "tokes" were part of petitioner's taxable income. In this refund suit brought in the United States District Court for the District of Nevada, the district court held that petitioner's tokes were nontaxable "gifts" from the casino patrons under Section 102 of the Internal Revenue Code of 1954 (Pet. App. A 12-13). The court of appeals unanimously reversed. It held that the tokes more closely resembled "commercial gratuities" which have long been recognized as a form of taxable income (Pet. App. B 20-21).

## ARGUMENT

1. Section 61(a) of the Internal Revenue Code of 1954 provides that "gross income means all income from whatever source derived * * *." This Court has held that "this language was used by Congress to exert in this field 'the full measure of its taxing power' " and thus "to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429-430. In keeping with this broad statutory language, this Court has defined income under Section 61 to include all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra*, 348 U.S. at 431.

One category of gross income specifically set forth in the statute is "[c]ompensation for services, including fees, commissions, and similar items" (Section 61(a)(1)). Treasury Regulations, Section 1.61-2(a)(1), Appendix, *infra*,

[2]"I-R." and "II-R." references are to the two-volume record in the court of appeals.

p. 9, provide that payments for services may take many forms including "[w]ages, salaries, commissions, * * * tips, bonuses * * *" and other payments.

In light of this broad statutory definition of gross income, the court of appeals correctly held that the tokes received by petitioner were identical to the "commercial gratuities" or "tips" received by employees in other occupations and were not nontaxable gifts. As the court stated, tokes, like tips, are received by those who are "engaged in rendering services * * * [and] in conformity with the practices of the area" and are "contributed by those with whom the taxpayers have some personal or functional contact in the course of the performance of the services" (Pet. App. B 21). Since it is well established that tips and similar payments are a form of taxable income (see *Commissioner* v. *Duberstein*, 363 U.S. 278, 285, n. 7), the court of appeals correctly concluded that tokes were simply another form of taxable compensation (Pet. App. B 21).[3] Accord: *Bevers* v. *Commissioner*, 26 T.C. 1218 (tokes held to be taxable income).

The district court's finding (Pet. App. A 12) that players did not give tokes as a form of compensation for services is not inconsistent with the court of appeals' conclusion (Pet. App. B 14) that tokes constitute taxable income. In the case of tips, such receipts are treated as a form of compensation for services despite the fact that the payor might be prompted by non-compensatory motives. *Roberts* v. *Commissioner*, 176 F. 2d 221, 226 (C.A. 9). The critical factor is that tokes, like tips, are received "as an incident to the service which [the recipient] * * * render[s] to his patrons." *Roberts* v. *Commissioner*, *supra*, 176 F. 2d at 226.

[3]The fact that the casino management permitted dealers to accept tokes while prohibiting other employees from accepting them indicates that the management exercised control over the "toking" practice and suggests that the practice was compensatory in nature.



2. The court of appeals correctly rejected the district court's conclusion that tokes constituted non-taxable "gifts" within the meaning of Section 102(a) of the Code, Appendix, *infra*, p. 9 (Pet. App. B 20). As this Court has held, a nontaxable "gift" must be the product of "detached and disinterested generosity." *Commissioner* v. *LoBue*, 351 U.S. 243, 246; *Commissioner* v. *Duberstein*, *supra* 363 U.S. at 285. A transfer is the product of "detached and disinterested generosity" if it proceeds from "affection, respect, admiration, charity, or like impulses." *Commissioner* v. *Duberstein*, *supra*, 363 U.S. at 285.

Here, in the commercial context in which these tokes were paid, there is no evidence establishing detached and disinterested generosity. While the district court premised its conclusion that the tokes were gifts on its finding that they were given as a "result of impulsive generosity or superstition on the part of players" (Pet. App. A 12), the court of appeals correctly concluded that this finding does not support the ultimate conclusion that tokes were the product of "detached and disinterested generosity." As the court of appeals stated, a payment which proceeds from superstitious belief that the payment will bring the player good fortune is in no way detached and disinterested (Pet. App. A 20). Moreover, any suggestion that tokes were the simple product of "impulsive generosity" of winning players desiring to share their good fortune (Pet. App. A 10) is contrary to the evidence, which showed that tokes were given to the dealers by winners and losers alike (II-R. 37).

3. Contrary to petitioner's contention (Pet. 7-8), the decision below does not conflict with either *Commissioner* v. *Duberstein*, *supra*, or *United States* v. *Kaiser*,

363 U.S. 299. In *Duberstein*, this Court held that when a case is tried without a jury, the trial court's findings may not be disturbed on appeal unless they are "clearly erroneous." See Rule 52(a), Federal Rules of Civil Procedure. The companion decision in *Kaiser* held that a jury acted within its competence in finding that strike benefits rendered to a class of persons in economic need were nontaxable gifts. Here, however, the court of appeals did not disturb the district court's findings as to the underlying facts or the inferences to be drawn from those facts. It ruled that the facts did not support the district court's conclusion of law that tokes were the product of "detached and disinterested generosity." See *Poyner* v. *Commissioner*, 301 F. 2d 287 (C.A. 4). Indeed, the court of appeals accepted the district court's finding (No. 17) (Pet. App. A 12) that the tokes were given as a result of impulsive generosity or superstition and not as a form of compensation. These motives, however, are not equivalent to the gift motives required under *Duberstein*: affection, respect, admiration, charity, or like impulses.[4]

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[4]The district court labeled its conclusion (No. 18) (Pet. App. A 12) that the tokes were a product of "detached and disinterested generosity" a finding of fact, but the court of appeals properly treated it as a conclusion of law because the formulation is the legal characterization of a gift employed in *Duberstein* (Pet. App. B 18). See *Poyner* v. *Commissioner*, *supra*. But even assuming *arguendo* that the district court's conclusion that tokes are the product of detached and disinterested generosity is a derivative finding of fact, the court of appeals made it clear that such a finding could not be reconciled with the underlying findings as to the players' motives in giving tokes (Pet. App. B 20-21).



## CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

**APPENDIX**

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

* * * * *



SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§1.61-1 *Gross income.*

(a) *General definition.* Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, §1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

* * * * *

§1.61-2 *Compensation for services, including fees, commissions, and similar items.*

(a) *In general.* (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination or severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United

States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

* * * * *

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of October, A.D. 1976.

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IN THE

# Supreme Court of the United States

October Term, 1976
No. 76-199

WENDELL OLK,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## Brief of Petitioner in Reply to Brief of the United States in Opposition to the Petition.

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## Brief of Petitioner in Reply to Brief of the United States in Opposition to the Petition.

### Question Presented.

The question as stated in the brief of the United States is deceptively wrong and is not the same question presented to Trial Court and the Court of Appeals.

The pre-trial order in this case was prepared by the tax division of the Department of Justice, approved by Petitioner's counsel and signed by the Honorable Roger Foley, United States District Judge for Nevada, November 27, 1974 R-1-pp. 127-132.

That pre-trial order provided, among other things:

"IV

The following is the issue of fact to be tried and determined upon trial:

Are the monies which were received by the plaintiff from patrons of the Casinos where he worked taxable income or gifts?

V

The issue of law to be tried is whether the monies received by the plaintiff in the manner indicated by the evidence were gifts within the meaning of Section 102 of the Internal Revenue Code."

In the brief filed by the United States in the Court of Appeals it says, on its first page, that the issue presented is whether the District Court erred in holding that taxpayer could exclude from his taxable income as "gifts" the amount of money or "tokes" that he received from patrons at the Las Vegas Casinos where he worked as a dealer.

Now the United States in its brief herein wants this Court to consider that the monies received by the dealer were payments regularly received from the patrons. Nothing could be further from the truth. Payment denotes an obligation to pay for something, services rendered, payment of a debt, or some other consideration received by the payor. The evidence and finding of the District Court make it clear there is no obligation on any patron to give a dealer anything and 90% of the patrons who gamble do not give anything



to the dealer. If monies sometimes received by dealers from patrons are payments, then monies sometimes given by patrons to strangers or mere speculators are also payments.

Nor is there any evidence in the record to indicate that the dealer received "tokes" regularly from patrons. The only evidence is an affidavit which a revenue agent prepared prior to a conference with Petitioner and signed by Petitioner April 10, 1973, in which he admitted receiving in 1971 from patrons at two Casinos where he worked a total of $3750.00—there is no evidence that these monies were received on a regular basis. As a matter of fact, the Department of Justice has reason to know that "tokes" are not received regularly by dealers since it took the deposition of all dealers listed as witnesses by Petitioner in the pre-trial order.

## ARGUMENT.

1. Petitioner is familiar with this Court's holding in *Commissioner v. Glenshaw Glass Co.*, and its definition of income under Section 61 of the Internal Revenue Code. Yet that same section of the Code and the regulation quoted in Government brief appendix defining what receipts are regarded as compensation for services, specifically says *unless excluded by law*. That exclusion is provided in Section 102 of the Code and has been part of the Code as long as Section 16 has.

The Appellate Judge who wrote the Court opinion asked Government counsel at the outset, "How do you get around Rule 52 of the Federal Rules of Civil Procedure?" The Court recognized that it could not reverse the Trial Court's findings unless they were clearly erroneous, but it avoids the rule by declaring Finding 18 to be a Conclusion of Law. The Government, neither in its brief, nor oral argument in the Court of Appeals, suggested this and the Court in oral argument never by question to either counsel indicated it might think so.

The Government in this Court seems to agree that Finding 18 is a Conclusion of Law and yet in its brief in the Appellate Court said this Finding was a factual determination and subject to the clearly erroneous rule. The Duberstein, Kaiser and Poyner cases agree that Finding 18 is a Finding of Fact. How then can the Appellate Court say this Finding is a Conclusion of Law? How can the Court hold that the Appellant has rebutted the presumption that the District Court's findings are correct—only by substituting its judgment for that of the District Court contrary



to Rule of this Court in the *Duberstein* and *Kaiser* cases?

2. The District Court did not find that tokes were given dealers out of "affection, respect, admiration or charity or like impulses", but it states in its memorandum opinion that "these spontaneous or superstitious impulses fall within the realm of possibilities contemplated by this Court in *Duberstein* and thus meet the test for a gift under the Internal Revenue Code." A product of detached and disinterested generosity.

The Government brief says tokes are given in a commercial context. Certainly there is no commercial relationship between patron and dealer. They are total strangers to each other. The dealers are employees of the Casinos and paid by them for the services they perform, and they are not permitted to render any special service to a patron.

In the case at bar it is possible that if each of the Appellate Judges were sitting individually as the trier of the facts, that each might find on the record that the tokes given dealers required gift treatment and yet draw different inferences as to the dominant motive. For example, one might agree with the District Court that the dominant motive was disinterested generosity, another might think it was a gratuitous impulse, and a third might infer it was "a tribute to the Gods of fortune, which will bring luck."

The District Court points out that a player's luck is beyond any control by the dealer if the game is an honest one. The dealer has no more control over it than a spectator to whom a patron gives money.

The object is to find which motive is dominant in a field of co-existing motives. The inquiry is not

limited to factors recognized by earlier decisions, so that this case is not absolutely bound by the words "detached and disinterested generosity" to categorize the handing over of money as a gift.

"Impulsive generosity" or superstition on the part of the players the Appellate Court accepts as the dominant motive. How does "impulsive generosity" differ from "detached or disinterested generosity"? It would be difficult to say that a certain percentage of the 5-10% of patrons who "toke" do so under "impulsive generosity" and the remainder are under superstition. The two are not one and the same and yet each by itself does not make for a dominant motive that can be construed as compensation for services and therefore taxable income.

Impulsive generosity connotes a sudden unpremeditated action implying a lack of anticipated benefit of an economic nature.

3. The Government seems to rely on the Appellate Court's statement that its view of the law is consistent with the trend of authority in the area of commercial gratuities. This is a reference to the tip cases. We are not here dealing with the matter of commercial gratuities as recognized all over the country, but with a very unique and different business, and with a limited number of people and these only in the State of Nevada. The District Court recognizes the difference. The Government in its brief here, as it did in the trial and Appellate Courts, insists in calling the money received by Petitioner and dealers as "tips"; and in its brief and oral argument in the Appellate Court it says that tips given waitresses, taxi-drivers, bartenders, etc., cannot be distinguished from "tokes" given dealers by



Casino patrons. By its constant references to what dealers got from patrons as "tips" the Government not only begs the question involved but does what this Court in the *Bogardus* case said you cannot do, that is:

> "You cannot make something taxable by using a subclassification which doesn't apply to it."

The Government relies on the Tax Court case of *Bevers* and the *Roberts* case in the Ninth Circuit. The Tax Court on practically the same evidence as the case at bar did not hold that the "tokes" received were compensation for services but only that they were received as an "incident of employment". That does not meet the test of the statutory requirement of compensation for services. Mr. Stanton would not have received money from Trinity Church had he not been Controller of the Church for many years before his resignation. Yet this Court held that what he got was a gift.

Petitioner agrees with the Ninth Circuit decision in the *Roberts* case. The Court found the taxi-driver had rendered a special service to the donor and also that there was a social compulsion involved in tipping a cab-driver. The Court also said that tipping a cab-driver lacked the essential element of a gift, namely, the transfer of property without consideration. That is the difference between the case at bar and the tip cases.

The District Court in the case at bar did not rule that tips do not represent taxable income. Instead, it ruled that money given to dealers, known colloquially as "tokes" were not tips; that "tokes" were gifts in the peculiar atmosphere of the gaming tables at which

they were made and consequently were excludible from income under Section 102.

4. The Government brief here says Court of Appeals opinion is not inconsistent with *Duberstein* and *Kaiser* cases in this Court but does not tell us why.

If the case at bar were submitted to a jury and the Court under proper instructions submitted as its only interrogatory whether the tokes received by Petitioner were gifts, and had the jury answered in the affirmative, this Court would affirm. That is the *Kaiser* case.

Is this Court going to give more credence to a jury finding than to a Senior United States District Judge who says, in his opinion, that he has "scrutinized the evidence with great care" and concludes that these spontaneous and superstitious impulses fall within the realm of possibilities contemplated by this Court in *Duberstein* and thus meet the test for a gift under the Internal Revenue Code?

5. The fact that the Department of Justice filed a brief opposing the granting of certiorari shows it realizes the importance of the case. It is important to the State of Nevada and its economy.

**Conclusion.**

The Petition for Writ of Certiorari should be granted for the reasons given in it and in this brief.

Respectfully submitted,

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